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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91180742
Party	Plaintiff Dr Pepper/Seven Up, Inc.
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

DR PEPPER/SEVEN UP, INC.,	X	
	:	
Opposer/Petitioner,	:	
	:	
- against -	:	<u>Consolidated Proceedings</u>
	:	Opposition No. 91180742
	:	Cancellation No. 92048446
	:	
KRUSH GLOBAL LIMITED,	:	
	:	
Applicant/Registrant.	:	
	X	

REPLY TRIAL BRIEF FOR OPPOSER/PETITIONER

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I. INTRODUCTION

This opposition proceeding is straightforward, and the facts, notwithstanding Krush Global's¹ attempts, are simple and undisputed. The Board is presented, on the one hand, with uncontroverted evidence of Dr Pepper's priority in the mark CRUSH used in connection with beverages, and, on the other hand, with Krush Global's attempt to register or maintain a registration for the mark CRUSSH for use in connection with restaurant services that feature beverages. In essence, the Board is presented with two nearly identical marks used in connection with clearly related goods and services, provided to the same class of consumers through related trade channels. Krush Global has offered no evidence to dispute these determinative facts.

Faced with this, Krush Global attempts to confuse the Board by pretending that the facts are other than what they really are. For example, Krush Global pretends that Dr Pepper does not own rights in the mark CRUSH but rather owns rights only in the mark ORANGE CRUSH. Krush Global also pretends that the application and registration at issue are limited to a certain type of restaurant serving a certain type of customer. The Board should not be misled by Krush Global's wishful but incorrect and misleading rendition of the facts.

Knowing that it cannot overcome the actual facts despite its efforts, Krush Global pins its hopes on rewriting the law, seeking to impose on Dr Pepper a standard for likelihood of confusion that Krush Global claims is uniquely applicable to cases concerning food or beverages and restaurant services. Of course, this heightened standard is located nowhere in the governing law and is simply a figment of Krush Global's imagination.

When Krush Global's imagined facts and fictional legal standard are properly discarded, and when the likelihood of confusion factors are analyzed and weighed, it is evident that Krush Global's CRUSSH Marks are likely to cause confusion with Dr Pepper's prior used, federally

¹ The abbreviations contained in the Trial Brief of Opposer/Petitioner are continued herein.

registered, and century-old CRUSH mark.

II. ARGUMENT

A. Krush Global Relies on Inadmissible, Refuted and Unsupported Facts

Krush Global's brief is dominated by reliance on inadmissible evidence, refuted "facts" and unsupported assertions. Krush Global's resort to such tactics simply shows the desperation of its position in these proceedings – and that the only conclusion that can be reached from the real evidence of record is that there is a likelihood of confusion between CRUSH and CRUSSH.

1. Krush Global Relies on Inadmissible Evidence

Dr Pepper has filed two pleadings objecting to certain evidence submitted by Krush Global. The first, Opposer/Petitioner's Motion to Strike Certain Evidence ("Motion to Strike"), sets forth *procedural* objections to Krush Global's evidence. The second, Opposer/Petitioner's Statement of Objections to Applicant/Registrant's Proffered Evidence ("Statement of Evidence Objections"), sets forth *substantive* objections to Krush Global's evidence.

The Motion to Strike is fully briefed: Krush Global submitted a brief in opposition on August 20, 2009, and Dr Pepper submitted a reply brief in further support of its motion on September 3, 2009. The motion remains pending – but it is telling that despite being made promptly aware of its procedural evidentiary errors, Krush Global made no effort to correct them. Dr Pepper renews its request that its Motion to Strike be granted in whole.

With regard to Dr Pepper's substantive objections to Krush Global's evidence, Krush Global has made no attempt to meet them. Krush Global made no response to Dr Pepper's Statement of Evidence Objections, and instead simply relied on the questioned evidence in its trial brief as if no objections had been lodged. Because Krush Global failed to respond, Dr Pepper's objections should be granted as conceded. Accordingly, Dr Pepper requests that all of the objectionable evidence identified in the Statement of Evidence Objections be stricken from

the record and be given no consideration in the resolution of these consolidated proceedings.²

2. Krush Global Relies on “Facts” Contradicted by the Evidentiary Record

In addition to relying on inadmissible evidence, Krush Global frequently relies on purported “facts” that are clearly contradicted by the evidentiary record. The table below compares some of the more notable false statements in Krush Global’s brief to the evidence of record. The mismatch is obvious.

Statement in Krush Global’s Brief	The Evidence of Record
“. . . nor does the company consider [CRUSH] to be one of its four core brands.” (Applicant/Registrant’s Trial Brief (“KG Br.”) at 5; <i>see also id.</i> at 17.)	Krush Global misquotes a document that references the term “CORE 4.” As Dr Pepper has explained (<i>see, e.g.</i> , Springate Tr. at 44:13 – 46:6; Springate Rebuttal Decl., ¶ 11), “CORE 4” does not have the meaning of “most important,” but rather refers to brands sold through a particular bottler network. ³
“DPSU indicates that it owns six of the top-ten flavored carbonated soft drinks in the United States ORANGE CRUSH is not even on this list.” (KG Br. at 5; <i>see also id.</i> at 17.)	CRUSH is in fact among the top-ten flavored carbonated soft drinks in the United States. (Springate Rebuttal Decl., Exh. PX209.)
“[T]he mark is known to the consumer as ORANGE CRUSH or GRAPE CRUSH, and so on. . . . There is simply no evidence that the CRUSH mark is either used alone or recognized by consumers as a stand alone trademark.” (KG Br. at 9.)	Dr Pepper markets the brand as CRUSH (<i>see, e.g.</i> , Springate Decl., ¶ 43 & Exhs. PX169, PX171, PX172, PX190, PX192, PX193, PX195), and consumers refer to the brand as CRUSH (<i>see, e.g., id.</i> at Exh. PX197).

² Because the Board has not yet ruled on Dr Pepper’s evidentiary objections, Dr Pepper has no choice for purposes of this reply brief but to continue to assume that all of Krush Global’s evidence is part of the record. However, by treating Krush Global’s evidence as properly made of record, Dr Pepper does not waive any of its evidentiary objections.

³ Krush Global’s continued use of the phrase “four core” despite it being repeatedly pointed out that the reading of the relied-upon exhibit is incorrect is particularly egregious in light of Mr. Wright’s admission on cross-examination that he does not know what the phrase “CORE 4” means to Dr Pepper or whether Dr Pepper refers to any of its products as “fore core brands,” the phrase he misuses in his declaration. (*See* Wright Cross Decl., ¶ 5.)

Statement in Krush Global's Brief	The Evidence of Record
Dr Pepper makes the “self-serving statement that consumers understand that ‘CRUSH brand beverages do not contain fruit.’ . . . In fact though, Opposer indicates that no surveys or market groups have been conducted to determine if consumers believe that CRUSH contains juice.” (KG Br. at 12.)	Dr Pepper has surveyed consumers about the juice content of CRUSH beverages, the results of which show that consumers overwhelmingly understand that CRUSH beverages do not contain juice. (<i>See</i> Springate Rebuttal Decl., ¶ 13 & Exh. PX214.)
“[Dr Pepper] has failed to provide any sample evidence of advertising run since 1980. . . . [Dr Pepper] does not ever recall doing national advertising for CRUSH brand sodas.” (KG Br. at 19.)	Dr Pepper has introduced national advertising for CRUSH beverages from as recently as 2009. (<i>See</i> Springate Decl., ¶¶ 36-37 & Exhs. PX192-PX196.)

Krush Global's distortion of the facts can be for no other purpose than to mislead the Board, and therefore the entirety of Krush Global's trial brief must be read with a watchful eye for purposeful distortions.

3. Krush Global Relies on Unsupported Assertions of “Fact”

In addition to relying on inadmissible evidence and assertions refuted by the evidentiary record, Krush Global also littered its trial brief with numerous assertions of “fact” that have no evidentiary support whatsoever. There are too many examples to list them all, but here are a few of the more egregious examples:

- “FANTA is the best selling orange soda in Europe.” (KG Br. at 5; *see also id.* at 25-26.)
- “Carbonated soda is considered by most to be an unhealthy beverage.” (KG Br. at 7; *see also id.* at 22, 25.)
- “Orange soda is consumer [sic] mostly by children.” (KG Br. at 22; *see also id.* at 25.)
- “Health conscious consumers are probably the most discerning purchasers, regardless of cost.” (KG Br. at 25.)
- “A person would not buy a smoothie when they really want soda and vice versa.” (KG Br. at 25.)

Again, Krush Global's reliance on unsupported assertions of "fact" should cause the Board to be very careful when considering the statements and arguments made in Krush Global's trial brief.

B. Krush Global's Proposed Likelihood of Confusion Test is Fiction

Not only is the "factual" underpinning of Krush Global's trial brief defective, so too is Krush Global's legal framework. From beginning to end, Krush Global's argument on likelihood of confusion is flawed. The first mistake Krush Global makes is to argue that the likelihood of confusion analysis in cases such as this – that is, those involving food or beverage products on the one hand and restaurant services on the other – is different from and more onerous than the likelihood of confusion test applied in every other Board proceeding. In such cases, Krush Global argues, not only must the marks at issue be *identical*, but also the opposer's mark must be "*well-known and famous*." (KG Br. at 7 (emphasis added).)

There is no question that Krush Global is wrong. The standard Krush Global advances is nowhere to be found in the single case Krush Global relies upon for its support – *Jacobs v. International Multifoods Corp.*, 212 U.S.P.Q. 641 (C.C.P.A. 1982). (KG Br. at 7.) *Jacobs*, and the two other cases cited by Krush Global in the same section, say nothing of the sort. These cases simply stand for the very unremarkable proposition that likelihood of confusion is not automatic just because the marks at issue may share some similarities and are used in connection with food or beverages on one hand and restaurant services on the other. *E.g. Lloyd's Food Prods., Inc. v Eli's Inc.*, 25 U.S.P.Q.2d 2027, 2030 (Fed. Cir. 1993) ("The board is correct that there is no *per se* rule about confusion where similar marks are used in connection with restaurant services and food products.") (citing *Jacobs*, 212 U.S.P.Q. at 642); *see also In re Coors Brewing Co.*, 68 U.S.P.Q.2d 1059, 1063 (Fed. Cir. 2003) ("[T]he fact that restaurants serve food and beverages is not enough to render food and beverages related to restaurant services for purposes of determining the likelihood of confusion. . . . The Board therefore

properly looked to other evidence to determine whether beer and restaurant services are related for purposes of assessing the likelihood of confusion.”).

Because the Board recognizes no *per se* rule that food or beverage products are related to restaurant services, the Board requires plaintiffs in such cases to show “something more than that similar or even identical marks are used for food products and for restaurant services.” *Jacobs*, 212 U.S.P.Q. at 642. However, the requisite “something more” can be shown in a variety of ways and, contrary to Krush Global’s unsupported assertion, does not require either that the marks at issue be identical or that the senior mark be famous – as numerous Board decisions confirm. In its opening trial brief, Dr Pepper cited at least eight cases in which the Board found a likelihood of confusion between marks for food or beverage products and marks for restaurant services. (*See* Trial Brief of Opposer/Petitioner (“DP Br.”) at 45-46.) Only one of these cases happened to involve identical marks, and none involved a senior mark found to be famous. Instead, the Board relied on a variety of evidence to conclude that “something more” had been shown, including a high degree of similarity between the marks, *e.g.*, *In re Constellation Wines U.S., Inc.*, Ser. No. 78/803,750, slip op. at 11 (*available at* <http://des.uspto.gov/Foia/RetrievePdf?flNm=78803750-04-17-2008&system=TTABIS>), 2008 TTAB LEXIS 377, at *5 (T.T.A.B. Apr. 17, 2008); the strength of the senior mark, *e.g.*, *In re Opus One Inc.*, 60 U.S.P.Q.2d 1812, 1814 (T.T.A.B. 2001); evidence of third parties using a single mark for both food or beverage products and restaurant services, *e.g.*, *In re Constellation Wines U.S., Inc.*, Ser. No. 78/803,750, slip op. at 7 n.6, 2008 TTAB LEXIS 377, at *9; evidence of third party registrations covering both food or beverage products and restaurant services, *e.g.*, *In re Azteca Rest. Enters. Inc.*, 50 U.S.P.Q.2d 1209, 1211 (T.T.A.B. 1999); the defendant’s own inclusion of plaintiff’s food or beverage products in its application, *e.g.*, *In re Sunland, Inc.*, Opp. Nos.

77/310,231 & 77/307,289, slip op. at 16-17 (available at <http://des.uspto.gov/Foia/ReterivePdf?flNm=77307289-08-07-2009&system=TTABIS>), 2009 TTAB LEXIS 525, at *18-19 (T.T.A.B. Aug. 7, 2009); and the defendant's own offering of plaintiff's goods at its restaurants, *e.g.*, *In re ML Management, Inc.*, Ser. No. 76/564,139, slip op. at 5 (available at <http://des.uspto.gov/Foia/ReterivePdf?flNm=76564139-05-30-2007&system=TTABIS>), 2007 WL 1676774, at *2 (T.T.A.B. May 30, 2007).

Dr Pepper has provided evidence bearing on each of the factors mentioned above – and then some. (*See* DP Br. at 42-45.) Consequently, there can be no question that Dr Pepper has met the Board's requirement that it show “something more” – and that Dr Pepper need not meet Krush Global's made-up standard requiring identical marks and fame.

C. Krush Global's Likelihood of Confusion Analysis is Flawed

Beyond its imagined legal standard, Krush Global also engages in an analysis of the likelihood of confusion factors that can best be described as a flight of fancy, as discussed in greater detail below.

1. Similarity of the Marks

The similarity of the marks is one of the most important *du Pont* factors, *Ava Enters., Inc. v. Audio Boss USA, Inc.*, 77 U.S.P.Q.2d 1783, 1784 (T.T.A.B. 2006), and the near identity of the marks at issue here – CRUSH and CRUSSH – cannot plausibly be disputed.

Apparently realizing that it could not argue with a straight face that CRUSH and CRUSSH are dissimilar in any way, shape or form, Krush Global's strained analysis of the similarity of the marks relies on two fictions. First, citing to First Circuit law, Krush Global pretends that the Board assesses the similarity of marks as they appear in the marketplace rather than as they appear on the face of the registrations or applications at issue. (KG Br. at 8.)

Although marketplace factors do have some bearing on the likelihood of confusion analysis in

Board proceedings (*see* DP Br. at 52-54), they generally do not bear on the question of mark similarity in such proceedings. Thus, Krush Global’s reliance on how the CRUSH marks appear in the marketplace (*see* KG Br. at 8-11)⁴ is simply misplaced and must be disregarded.

The second fiction Krush Global engages in is to pretend that Dr Pepper does not have rights in CRUSH standing alone.⁵ That leaves Krush Global free to base its entire argument against similarity of the marks at issue on the fiction that Dr Pepper has rights only in the mark ORANGE CRUSH. (*See, e.g.*, KG Br. at 9 (“[S]ince [Dr Pepper] has not argued that it owns a family of CRUSH trademarks, the mark to be considered in the *DuPont* [sic] analysis can only be the trademark that is used . . . Since [Dr Pepper] has indicated that the principal flavor mark is ORANGE CRUSH, that is the trademark that should be used for comparison purposes.”).)

Krush Global’s efforts – contrived as they may be – are understandable, as there can be no substantial debate regarding the overwhelming similarity of the real marks at issue here.

a. CRUSH and CRUSSH Are Virtually Indistinguishable

The word marks CRUSH and CRUSSH are virtually indistinguishable in terms of sight, sound and meaning. In fact, Krush Global admitted that it took Dr Pepper’s CRUSH mark and

⁴ Even if marketplace factors were relevant to analyzing the similarity of marks in Board proceedings, the “evidence” Krush Global purports to rely on could not be considered because Krush Global has made it up. There is no evidence in the record that the CRUSH mark appears only on “see-through bottle[s] or can[s] of the same color” (KG Br. at 8) or that “the first thing a consumer sees” is “always” “ORANGE CRUSH, the equivalent ‘Orange slice design’, and the orange flavored and colored soda which is visible through a soda bottle” (*id.* at 11). Moreover, the evidence refutes Krush Global’s repeated false assertion that consumers do not know the mark CRUSH standing alone. (*See, e.g.*, Springate Decl., Exh. 197; Springate Tr. at 18:15-21.)

⁵ In ignoring the existence of the mark CRUSH, Krush Global ignores not only Dr Pepper’s numerous registrations for the mark, but also trial evidence of Dr Pepper’s use of, and consumer recognition of, the CRUSH mark standing alone. (*See, e.g.*, Springate Decl., ¶ 43 & Exhs. PX169, PX171, PX172, PX190, PX192, PX193, PX195, PX197.) Even the CRUSH logos reproduced in Krush Global’s trial brief at pages 6 and 8 clearly show that CRUSH exists and is used as a stand-alone mark. The addition of design elements and flavor designations actually emphasizes that the name of Dr Pepper’s soda is, simply, CRUSH.

simply added an additional letter “S.” (KG Br. at 11; Learmond Decl., ¶¶ 17, 22.) However, the addition of the letter “s” does not differentiate the marks in any material way – as Krush Global also admitted at trial. (Learmond Tr. at 72:9-19; 63:15 – 65:17.) No amount of argument in Krush Global’s trial brief can overcome these determinative admissions.

Even without these admissions, however, the arguments in Krush Global’s trial brief are far from convincing. In terms of appearance, even Krush Global itself does not argue that the marks are visually distinctive, instead focusing all its efforts on distinguishing the parties’ respective logo marks. (KG Br. at 9-11.) As to the sound of the marks, Krush Global argues that its mark can be pronounced in any number of ways – consumers can extend or not extend the double-s for as long as they like (KG Br. at 11) – making the CRUSSH mark, by Krush Global’s own admission, identical in sound to the mark CRUSH.⁶ As to the marks’ meanings, to the extent Krush Global’s arguments that the term “crush” has many meanings (*see* KG Br. at 11-12) are relevant,⁷ such arguments could apply equally to CRUSH as to CRUSSH.⁸ Krush Global therefore has admitted that the marks have the same meaning.

Krush Global’s reliance on *7-Eleven, Inc. v. Wechsler*, 83 U.S.P.Q.2d 1715 (T.T.A.B.

⁶ This admission is bolstered by Mr. Learmond’s admission that generally no one in fact pronounces CRUSSH differently than they pronounce CRUSH. (Learmond Tr. 63:15 – 65:17.)

⁷ On this point, note that Dr Pepper’s CRUSH marks are incontestable and cannot be challenged as descriptive. Also note that, contrary to Krush Global’s statement (*see* KG Br. at 12), there are in fact survey results showing that the vast majority of consumers understand that CRUSH beverages do not contain fruit juice. (*See* Springate Rebuttal Decl., ¶ 13 & Exh. PX214.)

⁸ Krush Global does not – and cannot – argue that the additional letter “s” changes the meaning of CRUSSH from the meaning of CRUSH. In this respect, these marks are indeed different than those in which “s” makes a word plural or possessive, as Krush Global itself acknowledges. (*See* KG Br. at 12 (citing *Automatic Timing & Controls, Inc. v. McDowell-Wellman Eng’g Co.*, 162 U.S.P.Q. 462 (T.T.A.B. 1969) (Board concluded opposer not injured by registration of ABC where applicant already owned registration for ABCs); and *Hess’s of Allentown, Inc. v Nat’l Bellas Hess, Inc.*, 169 U.S.P.Q. 673 (T.T.A.B. 1971) (no likelihood of confusion between HESS’S and BELLAS HESS).

2007), concerning the lack of similarity between GULPY and GULP (*see* KG Br. at 11) and *Jacobs v. International Multifoods Corp.*, 212 U.S.P.Q. 641 (C.C.P.A. 1982), concerning the lack of similarity between BOSTON SEA PARTY and BOSTON TEA PARTY (*see* KG Br. at 13 n.2) is of little consequence here. Unlike CRUSSH and CRUSH – which look the same, sound the same, and have the same meaning – by no stretch of the imagination do either GULPY and GULP or BOSTON SEA PARTY and BOSTON TEA PARTY have the same look, pronunciation or meaning.

Krush Global's reliance on *In re Hearst Corp.*, 25 U.S.P.Q.2d 1238 (Fed. Cir. 1992) (involving VARGAS and VARGA GIRL), *Interstate Brands Corp. v. Celestial Seasonings, Inc.*, 198 U.S.P.Q. 151 (C.C.P.A. 1978) (involving RED ZINGER and ZINGERS), *King Candy Co. v. Eunice King's Kitchen, Inc.*, 182 U.S.P.Q. 108 (C.C.P.A. 1974) (involving MISS KING'S and KINGS), and *In re August Storck Kg*, 218 U.S.P.Q. 823 (T.T.A.B. 1983) (involving JUICY 2 and JUICY BLEND II) (*see* KG Br. at 13), is likewise misplaced, since, among other reasons, Dr Pepper owns rights in CRUSH, not just ORANGE CRUSH.

The cases that actually *are* relevant to this dispute are those cited in Dr Pepper's opening brief, cases in which the Board has held over and over again that two marks differing by a single letter – particularly a single letter repeated in the middle of a mark – are visually and aurally indistinguishable and make the same commercial impression on consumers. (*See* DP Br. at 36.) The Board must come to the same conclusion here with respect tot CRUSH and CRUSSH.

b. Krush Global's Logo Mark is Highly Similar to CRUSH

The CRUSSH Logo Mark at issue is also highly similar to Dr Pepper's established CRUSH mark. Although Krush Global attempts to limit the comparison of its logo mark only to

a recent version of Dr Pepper's ORANGE CRUSH logo format (*see* KG Br. at 9),⁹ the CRUSSH Logo should be compared to CRUSH standing alone as well as to any of Dr Pepper's logos.

Krush Global does not dispute that the dominant portion of its CRUSSH Logo Mark is the word CRUSSH. As such, for all the reasons discussed above with regard to the word marks, Krush Global's logo mark is essentially the same as Dr Pepper's CRUSH mark. *See, e.g., Ava Enters., Inc.*, 77 U.S.P.Q.2d at 1785 (design marks "highly similar" where word portion differed only by a single letter).

In fact, Krush Global has admitted – repeatedly – that the design portion of its logo mark has no source-identifying significance (*see, e.g.,* KG Br. at 3, 9; Learmond Tr. Dec. ¶ 16), and thus does not and cannot serve to differentiate the parties' marks. To the extent that the design portion of Krush Global's mark plays any role at all, the design, along with the orange coloring employed by Krush Global, serve only to reinforce the similarity created by dominant word portions of the marks. (DP Br. at 52-53.) Krush Global does not really dispute this, contending instead that the design and color features of Dr Pepper's logo mark are weak on the theory that similar features allegedly are used in connection with other orange sodas. (KG Br. at 10.)¹⁰ However, even Krush Global cannot have failed to notice that, unlike the CRUSSH Logo Mark, *none* of these third-party logo marks bear a word mark that resembles Dr Pepper's CRUSH mark in any way, shape or fashion. If anything, these logo marks serve merely to reinforce the similarity between Dr Pepper's CRUSH logo and Krush Global's CRUSSH logo.

⁹ For unknown reasons, Krush Global relies on a former version of Dr Pepper's logo for its orange-flavored CRUSH beverage, not the current logo. (*Compare* Springate Decl., Exh. PX169 with KG Br. at 9.)

¹⁰ Krush Global has submitted no evidence that any of the third party logos it references are in use. As such, even if the logos were relevant to any issue in this proceeding, they could not be considered. (*See* Statement of Evidentiary Objections at 4 (objecting to Wright Decl., ¶ 10).)

2. Strength of the CRUSH Mark

Krush Global's discussion regarding the fame of Dr Pepper's CRUSH mark proceeds from the incorrect assumption, discussed above, that Dr Pepper cannot succeed in this proceeding unless the CRUSH mark is famous. (*See* KG Br. at 14.) This is not the law. A mark's strength is merely one factor in determining the scope of protection, and therefore Dr Pepper does not need to prove that the CRUSH mark is famous in order to succeed on its claim. *E.g., Ava Enters.*, 77 U.S.P.Q.2d at 1786; *DC Comics v. Pan Am. Grain Mfg. Co.*, 77 U.S.P.Q.2d 1220, 1228 (T.T.A.B. 2005). Moreover, even relatively weak marks enjoy protection against closely similar marks for related goods. 2 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition*, § 11:76 (4th ed. 2009).

Even though Dr Pepper need not show that its CRUSH mark is famous or even particularly strong to succeed in this proceeding, Dr Pepper nonetheless has submitted evidence that its CRUSH mark is strong and well known, including evidence of consumer awareness of the CRUSH mark and evidence of the length and extent of Dr Pepper's use and promotion of the mark. Krush Global's arguments against Dr Pepper's evidence fail, as discussed below.

a. Survey Evidence Shows Significant Consumer Awareness

Dr Pepper presented survey evidence showing that [REDACTED] % of consumers know the CRUSH mark. (DP Br. at 29-30.) In tacit recognition that such evidence goes far to proving that the CRUSH mark is well known if not famous, Krush Global spends several pages of its trial brief attempting to attack the survey evidence. (*See* KG Br. at 14-16.) But none of Krush Global's attacks effectively challenge this substantial evidence of renown.

First, contrary to Krush Global's arguments, there is nothing questionable about the manner in which Dr Pepper's awareness survey was conducted. As Krush Global admits, the consumer awareness survey at issue was undertaken not in connection with this proceeding or

any other legal dispute, but rather as a regular part of Dr Pepper's business operations. (KG Br. at 14, 15; Springate Decl., ¶ 44.) This fact adds to, rather than detracts from, the survey's reliability. *Cf. Am. Home Prods. Corp. v. Barr Labs., Inc.*, 656 F. Supp. 1058, 1070 (D.N.J.) (attorney involvement in survey design adversely affects weight accorded to the results), *aff'd*, 834 F.2d 368 (3d Cir. 1987); *Boehringer Ingelheim G.m.b.H. v. Pharmadyne Labs.*, 532 F. Supp. 1040, 1058 (D.N.J. 1980) (attorney involvement in survey design identified as a weakness).¹¹

Krush Global also complains that the survey measured respondents' awareness of the mark ORANGE CRUSH rather than CRUSH standing alone. (KG Br. at 14.) KG raises this issue presumably in support of its theory that while consumers may be aware of the brand ORANGE CRUSH, they are not aware of the mark CRUSH. However, Krush Global's complaint fails for at least two reasons. First, as KG admits (KG Br. at 14), Dr Pepper's survey tested awareness of CRUSH standing alone at least in 2009, if not earlier. And, despite Krush Global's theory that consumers are more aware of the mark ORANGE CRUSH than CRUSH, awareness levels actually *increased* when CRUSH was tested in place of ORANGE CRUSH. (See Springate Decl., ¶ 45, as corrected by Springate Tr. at 18:15-21 (██████% average awareness in 2007-2008 vs. ██████% awareness in first quarter 2009)).

Finally, Krush Global attacks Dr Pepper's survey as showing very high aided awareness figures, but comparatively low unaided awareness figures. (KG Br. at 15.) However, Krush Global does not point to any case holding that aided awareness figures are irrelevant for assessing mark strength. In fact, there are a multitude of Board cases relying on aided awareness

¹¹ Krush Global complains that Andrew Springate, Dr Pepper's Senior Vice-President of Brand Marketing, could not explain the precise methodology of the survey. (KG Br. at 14.) This is an unfounded exaggeration: Mr. Springate testified as to how the survey was conducted in general terms, as KG itself admits. (KG Br. at 15; *see also* Springate Tr. 91:10 – 111:4.) Moreover, there is no reason that someone in Mr. Springate's position should be required to know the exact methodology of a survey conducted by a reputable, outsourced vendor.

figures to conclude that a senior mark is famous. *E.g., Novartis AG v. Cera Prods., Inc.*, Opp. No. 91173560, slip op. at 8 (*available at* <http://des.uspto.gov/Foia/ReterivePdf?flNm=91173560-03-20-2009&system=TTABIS>), 2009 WL 871661, at *3 (T.T.A.B. March 20, 2009); *Sara Lee Corp. v Mahmoud*, Opp. No. 91162134, slip op. at 8 (*available at* <http://des.uspto.gov/Foia/ReterivePdf?flNm=91162134-12-27-2007&system=TTABIS>), 2007 WL 4663353, at *3 (T.T.A.B. Dec. 27, 2007); *Hormel Foods Corp. v. Spam Arrest, LLC*, Canc. No. 9204213, slip op. at 44 (*available at* <http://des.uspto.gov/Foia/ReterivePdf?flNm=92042134-11-21-2007&system=TTABIS>), 2007 WL 4287254, *17 (T.T.A.B. Nov. 21, 2007); *Jack Daniel's Props., Inc. v. Quest Assocs., Ltd.*, Opp. No. 105,022, slip op. at 15 (*available at* <http://des.uspto.gov/Foia/ReterivePdf?flNm=91105022-07-12-2000&system=TTABIS>), 2000 WL 992415, *6 (T.T.A.B. July 12, 2000).

In sum, none of the attacks aimed at Dr Pepper's survey evidence of consumer awareness of the CRUSH mark hit their target. Consequently, the Board can and should rely on Dr Pepper's survey evidence showing that [REDACTED] % of consumers are aware of the CRUSH mark, and conclude on the basis of this evidence that the CRUSH mark is famous.

b. Evidence Shows Extensive Sales and Advertising of the CRUSH Mark

After its failed attack on Dr Pepper's awareness survey results, Krush Global turns its focus on Dr Pepper's evidence of the sale and marketing of CRUSH beverages.

Krush Global first admits that Dr Pepper's CRUSH marks have been used and advertised since the early part of the 1900s. (*See* KG Br. at 14, 19.) That the CRUSH mark has endured for over a century – a record that few brands can boast – speaks volumes about the mark's marketplace strength. Yet despite acknowledging the extensive and remarkable pedigree of the CRUSH brand, Krush Global nonetheless attempts to argue that the CRUSH mark cannot be

well-known because it is not the best-selling orange soda either in the United States or among Dr Pepper's own brands. (KG Br. at 17.) Krush Global's attack must fail, as there is simply no rule of law stating that only the top-selling mark in a given category can be well-known or deserving of robust protection. Is PEPSI not a famous brand worthy of the strongest protection simply because COCA-COLA outsells it? Of course not. Moreover, CRUSH has always been one of the best-selling orange sodas and currently is ranked second in the category, in addition to being among the top-ten flavored sodas of any variety. (Springate Decl., ¶ 24; Springate Rebuttal Decl., ¶ 7 and Exh. PX209.)

Krush Global also attacks Dr Pepper's sales figures and advertising spend and the geographic distribution of CRUSH soda. (KG Br. at 17-21.) However, as Krush Global itself admits, "[s]ales figures . . . do not necessarily reflect awareness or recognition of a mark." (KG Br. at 18 (citing *In re Bongrain Int'l (Am.) Corp.*, 13 U.S.P.Q.2d 1727 (Fed. Cir. 1990).) While Dr Pepper disputes Krush Global's contention that sales levels for CRUSH are insignificant, Dr Pepper agrees that sales figures from the recent past do not necessarily reflect the extent of consumer awareness of, or the strength of, the CRUSH mark, which the consumer awareness survey evidence and century-long history proves to be a strong brand. As Krush Global itself admits, the fact that CRUSH was not available nationwide in recent years¹² and did not achieve the sales success of SUNKIST had absolutely nothing to do with consumer recognition or

¹² Krush Global likes to pretend that CRUSH beverages were never available nationwide before 2009. (See, e.g., KG Br. at 5, 20.) However, Dr Pepper's witness testified that the more limited distribution of CRUSH beverages was only true for about eight to nine years (Springate Tr. at 60:12-15), and thus was a very recent and short-lived phenomenon in the 100-year-plus history of the brand. Krush Global makes similar – and undoubtedly purposeful – mistakes with respect to other evidence – for example, stating that "[u]ntil this year, ORANGE CRUSH soda was not even the second best selling orange soda in the United States: Coca Cola's [sic] FANTA was" (KG Br. at 5; see also *id.* at 17, 20), even though there is no evidence in the record concerning the market rank of CRUSH soda for any but the most recent two years of the brand's history.

inherent strength of the CRUSH brand, but rather merely reflected the practical effects of Dr Pepper's marketing choices. (KG Br. at 17-18; *see also* Springate Tr. at 58:1 – 59:16.) Now that Dr Pepper is focusing more marketing energy on the CRUSH brand, sales have spiked. (Springate Decl., ¶ 24; Springate Tr. at Exh. KGL 3.) This, even more than the past sales results, is a testament to the brand's power and marketplace recognition.

3. Similarity of Goods and Services

Another key factor in the *du Pont* analysis is the relatedness of the goods and services at issue. *Ava Enters. Inc.*, 77 U.S.P.Q.2d at 1784. Once again, Krush Global relies on imagined "facts" – specifically, the pretense that the services and goods at issue are different than what they really are – in an attempt to overcome this *du Pont* factor.

The CRUSSH application and registration at issue cover a broad identification of services, namely, "restaurant, catering, snack bar and café services; provision of prepared food; food and drink preparation and presentation services; bar services; catering services for the provision of food and drink; preparation of food stuffs or meals for consumption off the premises; sandwich and salad bar services; wine bar services." Notwithstanding this indisputable fact, Krush Global goes through great efforts to convince the Board that Krush Global's services are actually limited to "sell[ing] healthy food and beverages to health conscious consumers." (KG Br. at 22.)¹³

However, there are *no* limits in the application or registration as to the types of restaurant services to be provided under the CRUSSH Marks. There are *no* limits in the application or registration as to the type of food or drink to be served at the proposed CRUSSH restaurants.

¹³ Notably, this assertion is contradicted by the evidence. Mr. Learmond testified that CRUSSH restaurants offer unhealthy products and that the restaurant serves anyone who walks in, not just health-conscious consumers. (Learmond Tr. at 42:25 – 44:3.)

And there are *no* limits in the application or registration as to the types of consumers for Krush Global's CRUSSE-branded services. Krush Global's arguments and evidence as to the nature of its services actually offered in the U.K. are therefore irrelevant.

Krush Global's attempt to rewrite and narrow the scope of its intended use is transparent: it hopes to avoid the obvious relationship between the broad services identified in the application and registration at issue and the beverage and food goods on which Dr Pepper has long used its CRUSH marks. But the Board is required to consider the identification of services as set forth in the application and registration, not some imagined identification of services put forth solely for purposes of avoiding judgment. *Octocom Sys., Inc. v. Houston Computer Svcs. Inc.*, 16 U.S.P.Q.2d 1783, 1787 (Fed. Cir. 1990). Thus, the services relevant to this proceeding are those identified in the application and registration, namely, the provision of *any* type of food and *any* type of drink to *any* type of consumers. And, as Dr Pepper demonstrated in its opening brief (DP Br. at 39-46), those broad services are clearly related to the beverage products primarily offered under Dr Pepper's CRUSH marks (as well as the licensed food products offered under the mark).

While Krush Global cannot rewrite its identification of services to avoid judgment against it, it is nonetheless relevant to likelihood of confusion analysis that Krush Global intends to focus its offerings on beverage products, much as it does in its existing CRUSSE outlets in the U.K. (*See* DP Br. at 54.) It is clear that the beverage-centric restaurant services Krush Global seeks to provide are closely related to the beverage products on which Dr Pepper has used its CRUSH marks for more than a century. *See, e.g., In re Sage Dining Servs., Inc.*, Ser. No. 75/789,623, slip op. at 8-12 (available at <http://des.uspto.gov/Foia/ReterivePdf?system=TTABIS&flNm=75789623-05-07-2003>), 2003 TTAB LEXIS 216 (T.T.A.B. May 7, 2003).

Even the case on which Krush Global relies so heavily, *In re Coors Brewing Co.*, 68 U.S.P.Q.2d 1059 (Fed. Cir. 2003) (*see* KG Br. at 22-23), supports this conclusion. *Coors* concerned, *inter alia*, the question of whether beer is related to restaurant services. The Board held that beer and restaurant services were related, but the Federal Circuit held otherwise on the scant evidence presented. Noting that there is no *per se* rule that food and restaurant services are related, 68 U.S.P.Q.2d at 1063, the Federal Circuit nonetheless concluded that “th[e] case would be different . . . if the registrant’s mark had been for a brewpub or for restaurant services and beer. In that case, the goods and services associated with the two marks *would clearly be related.*” *Id.* at 1064 (emphasis added). Here, Krush Global’s broadly identified restaurant services, which by its own admission will be centered on providing beverages, are clearly related to Dr Pepper’s CRUSH-branded beverages, much like a brewpub is clearly related to beer.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Hasbro, Inc. v. Braintrust Games, Inc., Opp. No. 91169603, slip op. at 20 (*available at* <http://des.uspto.gov/Foia/ReterivePdf?flNm=91169603-08-24-2009&system=TTABIS>), 2009

TTAB LEXIS 543, at *25 (T.T.A.B. Aug. 24, 2009) (“Even the registration of arguably confusing marks does not give applicant the right to register another confusing mark.”) (citations omitted).

4. Overlapping Trade Channels

In analyzing the similarity of trade channels, unless there is a limitation in the services identification at issue, the Board presumes that the services are marketed in all normal trade channels for the identified services to ordinary consumers for such services. *In re Elbaum*, 211 U.S.P.Q. 639, 640 (T.T.A.B. 1981). In order to avoid the conclusion that the parties’ trade channels and consumers overlap, Krush Global again engages in the fiction that its services are narrowly limited to serving healthy food and beverages to city-living, health-conscious consumers. (*See* KG Br. at 23.) Krush Global also continues to make up “facts” to support its untenable analysis.

As discussed above, the application and registration at issue include a broad identification of restaurant services. Despite this, Krush Global pretends in its trial brief that its use of the CRUSSH mark will be limited to “stand-alone facilit[ies] located in busy, high-traffic, metropolitan locations” frequented “by busy professionals looking to grab a healthy breakfast, lunch or smoothie.” (KG Br. at 24.) However, as discussed above, there is no such limitation in Krush Global’s application and registration at issue. And, as with the *du Pont* factor concerning similarity of the goods and services, the factor concerning overlap of trade channels must be considered in light of the full identification of services in the application and registration at issue. *Octocom Sys., Inc.*, 16 U.S.P.Q.2d at 1787. As shown in Dr Pepper’s opening brief, these broad restaurant services include the types of restaurant services selling Dr Pepper’s CRUSH soda and licensed food products. (DP Br. at 46-47.) The trade channels clearly overlap.

Krush Global's arguments that Dr Pepper's CRUSH beverages have only limited distribution is not only factually incorrect, it is legally irrelevant to the question of whether the parties' trade channels overlap. Krush Global again relies on the false "fact" that CRUSH beverages have only limited distribution (KG Br. at 23), despite the evidence that CRUSH beverages are actually available throughout the United States. (Springate Decl., ¶ 17, 22.) Krush Global also attempts to rely on the theory that CRUSH beverages are found in very few restaurants. (KG Br. at 25.) Besides being contrary to the record (*see, e.g.*, Springate Decl., ¶ 17 (CRUSH beverages found in thousands of restaurants)), this assertion is legally irrelevant: even if CRUSH beverages were sold in only one food service outlet, the trade channels would overlap.

Further, the argument that Krush Global does not currently sell its juice products in third-party retail locations (*see* KG Br. at 23-24) ignores the relevant inquiry, which is whether consumers would believe that Krush Global's CRUSSH mark, when used in connection with restaurant services, is somehow associated or connected with Dr Pepper or its CRUSH mark. *Cf. Venture Out Props. LLC v. Wynn Resorts Holdings, LLC*, 81 U.S.P.Q.2d 1887, 1892 (T.T.A.B. 2007). The argument also ignores the extensive third-party evidence showing that it is a common phenomenon for companies – including, critically, Dr Pepper – to sell food or beverage products in mass-market chains and supermarkets under an identical mark as that used for offering restaurant services. (DP Br. at 42-44.)¹⁴ In light of this evidence, it is irrelevant

¹⁴ Krush Global's reliance on *In re Shoe Works, Inc.*, 6 U.S.P.Q.2d 1890 (T.T.A.B. 1988), in support of its arguments that there can be no overlap of trade channels here because Krush Global's services are limited to its own restaurants (*see* KG Br. at 23-24) is misplaced. *In re Shoe Works* was a case in which two parties had entered into a coexistence agreement specifying that confusion was unlikely because the applicant's sales were limited to applicant's own stores and in which the applicant had limited the identification of goods in its application to specify that the goods would be sold only in applicant's stores. There is no such coexistence agreement here.

5. Consumer Sophistication

Krush Global's arguments regarding consumer sophistication are even more fanciful than its preceding arguments. To arrive at its conclusion that consumers are not likely to be confused, Krush Global once again engages in the fiction that its restaurant services will be offered only to health-conscious consumers – a fiction that is contrary both to the broad identification of services at issue here and to the evidence of record. (*See* Learmond Tr. at 42:25 – 44:3 (testifying that Krush Global sells to anyone, not just health-conscious consumers).) Krush Global also relies on several baseless facts about the parties' respective consumers: that its own consumers are uniformly health-conscious and "the most discerning purchasers, regardless of costs" and that CRUSH beverages are unhealthy and consumed mostly by children. (KG Br. at 25.) As noted above, the evidence refutes Krush Global's assertion that it only serves health-conscious consumers, and there is simply no evidence concerning the purportedly "discerning" purchasing habits of health-conscious consumers in any event. There is also no evidence in the record that orange soda is unhealthy or is consumed mostly by children.¹⁶

Because Krush Global's arguments regarding the alleged sophistication of consumers have no evidentiary support, they must be disregarded. Instead, the Board should look at the only actual evidence of record – that both parties sell inexpensive fare – and conclude that the

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¹⁶ Even if Krush Global were correct that orange soda is consumed mostly by children, this fact would work against Krush Global rather than for it. Children are inherently unsophisticated, so even if Krush Global's allegedly health-conscious consumers are able to differentiate between CRUSH and CRUSSH, the unsophisticated children who supposedly consume CRUSH beverages – and who also must be protected by trademark law – would not be.

goods and services at issue here are likely to be the subject of casual, impulse buying by hungry and thirsty consumers who are very unlikely to notice the insignificant differences between CRUSH and CRUSSH.

III. CONCLUSION

In sum, Krush Global's trial brief is full of conjecture, misstatements of fact and law, and pure flights of fancy. There is nothing in Krush Global's trial brief or in Krush Global's evidence (admissible or inadmissible) that refutes Dr Pepper's clear showing in its opening trial brief and herein that there is a likelihood of confusion between the mark CRUSH and the CRUSSH Marks at issue. Accordingly, Dr Pepper respectfully requests: (1) that registration of Application Serial No. 79/033,050 be denied; (2) that Registration No. 3,275,548 be cancelled; and (3) and that judgment for Dr Pepper be entered in this consolidated proceeding.

Dated: New York, New York
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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **Reply Trial Brief of Opposer/Petitioner** to be deposited with the United States Postal Service as First Class mail, postage prepaid, in an envelope addressed counsel for applicant, Jason Drangel, Esq., Epstein Drangel Bazerman & James, LLP, 60 East 42nd Street, Suite 820, New York, NY 10165, this 28th day of December, 2009.

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